

STATE OF MICHIGAN
COURT OF APPEALS

UNPUBLISHED

May 17, 2011

In the Matter of S. A. McGOWAN, Minor.

No. 300309

Washtenaw Circuit Court

Family Division

LC No. 08-000082-NA

Before: DONOFRIO, P.J., and BORRELLO and BECKERING, JJ.

PER CURIAM.

Respondent appeals as of right from the trial court order terminating her parental rights to the child under MCL 712A.19b(3)(c)(i) (conditions leading to adjudication not rectified), (c)(ii) (conditions arising after adjudication not rectified), (g) (failure to provide proper care or custody), and (j) (reasonable likelihood that child will be harmed if returned home). Respondent contends that the trial court should have granted her petition to place the child in a subsidized guardianship rather than terminate her parental rights. Because the trial court did not clearly err when it found that termination of respondent's parental rights, in lieu of guardianship, was in the child's best interests, we affirm.

I. BACKGROUND

The child came into the court's custody after respondent heard voices telling her to harm herself and tried to set her home on fire while the child was upstairs. Respondent was diagnosed with a number of mental illnesses as well as cocaine addiction. Petitioner placed the child with respondent's sister, N. McGowan. N. McGowan took appropriate care of the child, who had both academic and emotional special needs, taking her to counseling, ensuring her attendance at school, and overseeing her diabetes. N. McGowan testified that she loved the child and wanted to care for her, either through a guardianship or adoption.

From the time the child came into the court's care, the parties worked toward placing the child in a subsidized guardianship with her aunt. Respondent, her guardian ad litem, the child's guardian ad litem, and petitioner were all in favor of the guardianship. Initially, the referee overseeing the case also considered a guardianship the appropriate resolution for the case. However, because the guardianship paperwork had not been approved by the state at the time of the permanency planning hearing, the referee ordered petitioner to file a termination petition with the understanding that the petition could be dismissed if guardianship was granted. Petitioner filed a supplemental petition seeking termination of respondent's parental rights to the child. A few months later, the child's guardian ad litem filed a petition for an order appointing N.

McGowan as the child's juvenile guardian. The referee denied the motion, concerned that a guardianship would not provide the stability and permanence the child needed and changed the permanency plan to adoption. The court affirmed the referee's decision.

The case proceeded to the termination hearing, and respondent demanded that her case be heard by a judge. Respondent's counsel filed a motion for guardianship. The court informed the parties that it would consider the motion for guardianship in tandem with the evidence at the termination hearing.

At the termination hearing, caseworker Miriam Taylor testified that respondent had failed to address any of the problems that existed when the child was brought into the court's care, including her mental health, her cocaine addiction, her ineffective parenting, and she had been incarcerated for much of the time the child had been in the court's care. Taylor described the child as "exceptionally fragile" and believed that termination of respondent's parental rights would negatively affect the child. Taylor believed it was in the child's best interest to be placed in a subsidized guardianship with her aunt, and, in the alternative, to terminate respondent's parental rights. Taylor testified that, regardless of whether the court terminated respondent's parental rights or granted the guardianship petition, the child would be placed with her aunt.

N. McGowan testified that she loved the child and wanted to care for her, whether through a guardianship or an adoption. She believed respondent cared for the child but noted that respondent had only sporadic contact with the child in the months before the termination hearing and her interactions with the child were minimal. She did not think respondent posed a risk of harm to the child. She also believed she could manage respondent.

Respondent appeared on the third day of the termination hearing. She testified that she loved the child and denied that the child was in danger in her care. She admitted that she had been convicted eight times for retail fraud since 2001, was convicted of assault and battery in 2006, and was convicted of home invasion and larceny in a building in 2008 and had spent a year in jail. She wanted the court to place the child in a juvenile guardianship with her sister and testified that she would obey the guardianship rules. She also testified that she ultimately intended to get the child back in her care, with the court's approval.

The court issued a written opinion and order terminating respondent's parental rights under MCL 712A.19b(3)(c)(i), (c)(ii), (g), and (j). The court found that termination of respondent's parental rights was in the child's best interest, stating that adoption by respondent's sister would give the child the stability and security she deserved. The court recognized that there was "some remote bond" between respondent and the child but concluded that it would be unsafe to return the child to respondent's care. The court did not further address the guardianship petition. Respondent now appeals as of right.

II. ANALYSIS

On appeal, respondent challenges the court's failure to grant her petition for guardianship, contending that the court erred because: (1) the parties had agreed to a guardianship, leaving the court without a case or controversy to resolve, (2) the Legislature expressly provided that guardianship was a permanency planning option and, by failing to grant

the guardianship, the court usurped the powers of the Legislature and violated the separation of powers, and (3) the best interests of the child favored the child's placement in a juvenile guardianship with N. McGowan, not termination of respondent's parental rights.

A. PARTIES' AGREEMENT TO THE GUARDIANSHIP

Respondent's first argument, that the court did not have any authority to deny the guardianship when the parties had all agreed to it, involves a question of law, which this Court reviews de novo. *In re Fried*, 266 Mich App 535, 538; 702 NW2d 192 (2005).

Respondent's argument that the court was obligated to accept the parties' agreement is without legal basis. Contrary to respondent's assertion that there was no case or controversy before the court, the court did in fact have a case before it, the supplemental petition filed by petitioner seeking termination of respondent's parental rights. Under MCR 3.977(A)(2), the court may commence proceedings to terminate parental rights once a petition to terminate parental rights is before it. Because there was a petition for termination of parental rights before the court, the court properly considered termination of respondent's parental rights.

Furthermore, any agreement between the parties did not relieve the court of its obligations under the Juvenile Code. Under the Juvenile Code, the court has the authority to require petitioner to file a termination petition, and if it does not order petitioner to initiate a termination petition or if petitioner demonstrates to the court that initiating a termination is clearly not in the child's best interests, then it has the authority to appoint a guardian. MCL 712A.19a(6) and (7). Nothing in the statute relieves the court of its duties if the parties agree to a particular permanency plan. Unlike a civil suit, where the court is the arbiter of a disagreement and the parties can agree to settle out of court, in a child custody protective proceeding under the Juvenile Code the court is required to ensure the protection of the child over whom it has jurisdiction. Accordingly, the fact that the parties may have agreed on a guardianship did not bind the court to accept this agreement.

Finally, respondent's characterization that all parties were in favor of the guardianship over termination of parental rights is not quite accurate. It is true that the parties discussed guardianship as the preferred outcome when the child was first placed in the court's custody, and even the referee was in favor of a guardianship. However, at the termination hearing, petitioner was not entirely opposed to the termination of respondent's parental rights. While the caseworker in the instant case felt that termination of respondent's parental rights would have a negative effect on the child and believed a subsidized guardianship with the child's aunt was in the child's best interests, she was not opposed to termination of respondent's parental rights. She added that, regardless of whether the child was placed in a guardianship or respondent's parental rights were terminated, the child would be placed with her aunt. In her closing argument, the assistant prosecuting attorney asked the court to terminate respondent's parental rights and allow N. McGowan to adopt the child but added that petitioner was not opposed to a guardianship. Since petitioner was receptive to a termination of respondent's parental rights as an acceptable outcome in this case, respondent's claim that all the parties favored guardianship is not as clear as respondent contends.

B. USURPATION OF LEGISLATURE

Respondent also argues that the trial court violated the separation of powers and usurped the Legislature's authority when it denied her guardianship petition. Respondent's argument presents a constitutional issue, which this Court reviews de novo. *In re Rood*, 483 Mich 73, 91; 763 NW2d 587 (2009).

Respondent contends that the Legislature provided a guardianship as a permanency planning option and that the trial court usurped the Legislature's authority and violated the separation of powers doctrine when it terminated respondent's parental rights rather than place the child in guardianship. Under the separation of powers doctrine, the Legislature and Governor make policy choices and the courts enforce those political decisions as written. *King v State*, 488 Mich 208, 233; 793 NW2d 673 (2010). The court has the constitutional authority to exercise only the judicial power, not "powers properly belonging to another branch." Const 1963, art 3, § 2.

In this case, the court, in electing to terminate parental rights rather than place the child in a guardianship, was enforcing the law in the manner provided by the Legislature. As respondent recognizes, the Legislature provided that guardianship is an "option" for children placed in the court's custody. The court may consider a juvenile guardianship among other forms of alternate placement at a permanency planning hearing in lieu of ordering the Department of Human Services to initiate termination proceedings. MCL 712A.19a(7)(c). However, nothing in the law prohibits a trial court from terminating parental rights when it could alternatively place the child with relatives. *In re McIntyre*, 192 Mich App 47, 52; 480 NW2d 293 (1991). Accordingly, the court did not usurp the Legislature's authority or violate the separation of powers doctrine by considering options other than a guardianship in this case.

C. BEST INTERESTS OF THE CHILD

Respondent finally contends that the trial court clearly erred when it decided that the best interests of the child required termination of respondent's parental rights rather than the child's placement in a juvenile guardianship with her aunt. This Court reviews the trial court's findings regarding whether termination is in the child's best interests for clear error. *In re Trejo*, 462 Mich 341, 356-357; 612 NW2d 407 (2000); *In re Jones*, 286 Mich App 126, 129; 777 NW2d 728 (2009).

The court is required to terminate parental rights if it finds that there are grounds for termination and termination is in the child's best interest. MCL 712A.19b(5). In determining whether the child's best interest requires termination of parental rights, a court may consider evidence introduced by any party or based on the whole record proffered to establish the ground for termination. *Trejo*, 462 Mich at 356-357. The primary beneficiary of this analysis is to be the child. *Id.*

Evidence in this case showed that the child came into the court's care after respondent, who claimed to hear voices telling her to harm herself, tried to set fire to her home while the child was upstairs. Respondent failed to comply with her parent-agency agreement and had not taken any parenting classes or addressed her mental health or drug addiction issues. She had minimal contact with the child in the months preceding the termination hearing. Respondent had an extensive criminal history of arrests and convictions for retail fraud, theft, and shoplifting.

She spent much of the last year the child was in the court's care in jail for home invasion, larceny in a building, and probation violations. While the caseworker testified that the child was "extremely fragile" and termination of respondent's parental rights would negatively affect the child, the caseworker was not opposed to termination, indicating that, in the alternative to the child's placement in a guardianship with her aunt, the child's best interests were served by terminating respondent's parental rights. She also indicated that, regardless of whether the court terminated respondent's parental rights or granted the guardianship petition, the child would be placed with her aunt, with whom she had bonded while she was in the court's care. The record also showed that respondent believed the guardianship would allow her to eventually get the child back, a situation that would undermine the stability and permanence the child needed. The foregoing evidence showed that termination of respondent's parental rights was in the child's best interests. MCL 712A.19b(5); *Trejo*, 462 Mich at 356-357. Thus, the trial court did not err in terminating respondent's parental rights to the child.

Affirmed.

/s/ Pat M. Donofrio
/s/ Stephen L. Borrello
/s/ Jane M. Beckering